

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAN G. GOWDY)	
Claimant)	
VS.)	
)	Docket No. 189,514
PICKRELL DRILLING COMPANY, INC.)	
Respondent)	
AND)	
)	
ITT HARTFORD)	
Insurance Carrier)	

ORDER

Respondent appealed the Award entered by Administrative Law Judge John D. Clark on August 31, 1995. The Appeals Board heard oral argument by telephone conference.

APPEARANCES

Claimant appeared by and through his attorney, Kent Roth of Great Bend, Kansas. Respondent and its insurance carrier appeared by and through their attorney, James M. McVay of Great Bend, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record as listed in the Award. Additionally, the Appeals Board considered the evidentiary deposition of Bill McVey dated July 12, 1995, and the evidentiary deposition of Stephen Asbury, R.P.A., dated June 27, 1995. Neither of those depositions were listed in the record of the Award but both parties agreed at oral argument that the Appeals Board should consider both of those depositions as evidence for this review.

STIPULATIONS

The Appeals Board adopted the stipulations listed in the Award.

ISSUES

Respondent requested Appeals Board review of the following issues:

- (1) Whether claimant's neck injury arose out of the February 2, 1994, work-related accident.
- (2) Nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) Respondent admits claimant sustained an injury to his low back in an accident that occurred while he was working for the respondent on February 2, 1994. The dispute that arises between the parties is whether claimant also sustained a neck injury as a result of that accident.

On February 2, 1994, claimant was employed by the respondent as a roughneck on an oil rotary drilling rig in Harper County, Kansas. Claimant's job was that of a chain man which required him to service motors and perform other general maintenance activities. Claimant testified he fell when he stepped in an opening in the hinge of the base of the oil rig while he was carrying a full gallon of oil to a motor. Claimant's left foot went through the opening to the ground which caused claimant to twist and strike his right knee on the iron base of the oil rig spilling the bucket of oil. The accident occurred about 10 a.m. and claimant was able to work through the remainder of his shift that ended at 2 p.m. No one witnessed claimant's accident.

The oil rig was located some 2 ½ hours from claimant's residence in Great Bend, Kansas. During the ride home after work, claimant testified his back was hurting "something awful." Immediately after claimant arrived home, he took a hot bath and found he could not get out of the bathtub because of the increased pain. Claimant first sought medical treatment that evening at the Ellinwood District Hospital. He was seen by Stephen D. Asbury, a registered physician assistant, employed by Robert Shively, M.D. Mr. Asbury examined the claimant and diagnosed low back pain, probably muscular in origin. Pain medication and physical therapy were prescribed and an MRI was ordered. Claimant was also taken off work.

Claimant did not give Mr. Asbury a history of neck complaints during that first visit. The first time claimant complained about pain and discomfort in his neck was on February 14, 1994. The physical therapy note on that day quotes claimant as stating "my

neck hurts as much as my back.” Claimant was also seen by Mr. Asbury following the physical treatment session and Mr. Asbury’s medical note indicated that claimant’s muscular pain was radiating up the back into his neck. Nevertheless, claimant testified that immediately following the accident he had both low-back and neck pain. Claimant further testified his neck pain caused him to have headaches but because his low-back pain was the worst, he did not mention his neck pain until later. Additionally, claimant testified his neck pain worsened while he was in physical therapy to a point it exceeded his low-back pain.

Mr. Asbury opined that a person with low-back pain will posture himself to move his body as a unit and such movement is abnormal which creates additional stress on the paraspinal muscles in the mid-back and neck areas resulting in pain. Because the claimant continued to have pain and discomfort in both of those areas, Mr. Asbury referred claimant to Paul S. Stein, M.D., a neurosurgeon, in Wichita, Kansas.

Dr. Stein examined and evaluated the claimant on March 11, 1994. Dr. Stein found claimant to have degenerative changes in both the lumbarsacral and cervical areas of the spine. The doctor found bulging discs but no apparent herniated discs. His impression was cervical and lumbar degenerative disc disease with strain syndrome in both of those areas. Dr. Stein did not recommend surgery. He recommended claimant enter into a drastic weight-loss program, generalized conditioning program, and epidural injections.

Thereafter, Mr. Asbury referred claimant to J. M. Mohler, M.D., for further evaluation and treatment. Dr. Mohler treated claimant with trigger-point injections and physical therapy from May 4, 1994 through July 13, 1994, when he retired from the practice of medicine. Dr. Mohler diagnosed soft tissue injury to claimant’s low back and neck as a result of his work-related fall.

Further medical treatment was provided by the respondent with Pedro Murati, M.D., a specialist in physical medicine and rehabilitation, located in Wichita, Kansas. Dr. Murati followed claimant from October 20, 1994, until he released claimant with a permanent functional impairment rating and permanent work restrictions on February 23, 1995. In accordance with the Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, Dr. Murati opined that claimant had a 10 percent whole body permanent functional impairment for the loss of range of motion to the cervical and lumbar regions. Dr. Murati reviewed the results of a functional capacity evaluation (FCE) conducted on February 16, 1995, and utilizing those results as a guiding factor found claimant should be permanently restricted to lifting a maximum of 60 pounds, 13-30 pounds frequently, and 0-12 pounds constantly. Claimant was permitted to occasionally sit, squat, kneel, and crawl. Claimant was also permitted to frequently stand, walk, bend, reach, and climb. Dr. Murati testified on cross-examination that in addition to claimant’s subjective complaints in the cervical area of his spine, claimant had objective findings of increased muscular tone and trigger-points in the occipital region. The doctor concluded those objective findings were consistent throughout his treatment program.

Respondent argues claimant failed to prove his neck injury resulted from the February 2, 1994, accident. Respondent's main contention is that claimant's failure to contemporaneously make complaints to health care providers about pain in his neck established that claimant's neck was not injured in the February 2, 1994, work-related accident. The medical records indicate claimant did not make complaints about a problem with his neck until February 14, 1994, 12 days following his date of accident. However, claimant's own testimony verifies that after the accident he had in addition to his severe low-back pain, symptoms in his neck causing him headaches. The neck symptoms worsened during physical therapy sessions to the point those symptoms were worse than the low back pain. Thereafter, claimant received treatment for both a low-back and a neck condition from all the treating health care providers. The evidentiary record also established claimant did not have low-back or neck symptoms before February 2, 1994. Furthermore, there is no explanation in the record for claimant's subjective pain complaints and objective medical findings concerning his neck injury other than the accident that occurred at work on February 2, 1994. Accordingly, the Appeals Board finds the Administrative Law Judge's decision that claimant's neck injury arose out of the work-related accident of February 2, 1994, should be affirmed.

(2) The Administrative Law Judge found claimant was entitled to permanent partial general disability benefits in the amount of 83.5 percent based on work disability. The 83.5 percent work disability was based on claimant's loss of ability to perform work tasks of 67 percent averaged with a wage-earning loss of 100 percent. Respondent contends claimant failed to prove he was eligible for work disability, or in the alternative, the work disability evidence in the record supported a much lower disability award.

Respondent argues the permanent restrictions placed on the claimant by Dr. Murati are not appropriate because the FCE which was the basis for the restrictions was influenced by claimant's poor cardiovascular condition and did not find claimant to have a functional strength deficiency. Dr. Murati acknowledged those were two of the conclusions of the FCE. However, Dr. Murati also opined claimant had the physical ability to perform the heavy oil fieldwork before his injury without limitations. Therefore, Dr. Murati concluded the limitations he placed on the claimant using the FCE as a guide are the result of claimant's injuries. The Appeals Board finds Dr. Murati's permanent restrictions are valid and should be utilized to determine claimant's eligibility for a work disability.

Since claimant's date of accident is post-July 1, 1993, claimant's eligibility for work disability award is determined by the "new act" provisions of K.S.A. 44-510e. An employee is eligible for work disability if the employee is not earning wages equal to 90 percent or more of the average weekly wage the employee was earning at the time of the injury. The "new act" work disability test contains two components. The first component is the loss of workers ability to perform work tasks the worker performed during employment in the 15-year period next preceding the accident. The second component of the work disability test is the difference between the wage the worker was earning at the time of injury and the wage the worker is earning post-injury. Both of those components are then required to be averaged together to arrive at a work disability. See K.S.A. 44-510e(a).

The only testimony in the record on claimant's ability to perform work tasks was presented by Dr. Murati. Dr. Murati reviewed a list of 16 work tasks claimant had performed in the 15 years preceding his accident that were developed by vocational expert, James Molski. Mr. Molski was retained by the claimant for the purpose of interviewing the claimant and developing the work tasks list. Dr. Murati reviewed the work tasks list and opined claimant could no longer perform 9 of the 16 work tasks because of his current permanent restrictions. Therefore, the Appeals Board concludes claimant has lost 56 percent of his ability to perform work tasks.

The respondent argues claimant's list of work tasks performed should contain an additional six work tasks which were not included in the list developed by Mr. Molski. However, those additional work tasks were not presented to a physician for an opinion on whether claimant was capable of performing such tasks as required by K.S.A. 44-510e. Accordingly, since no physician gave an opinion on those additional work tasks, Dr. Murati's opinion on work tasks loss is the only competent opinion contained in the record.

Claimant established through his testimony at the regular hearing that he was not employed and had not been employed since the date he last worked for the respondent on February 2, 1994. Claimant verified he had been actively seeking employment but was unable to find employment because of his injuries and permanent restrictions. Accordingly, the Appeals Board finds claimant has suffered a 100 percent wage loss.

The "new act" requires the work tasks loss of 56 percent to be averaged with the 100 percent wage loss resulting in a work disability of 78 percent. The Appeals Board finds 78 percent is the appropriate amount to award claimant permanent partial general disability benefits.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark dated August 31, 1995, should be, and is hereby, modified and an award is entered as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Dan G. Gowdy, and against the respondent, Pickrell Drilling Company, Inc., and its insurance carrier, ITT Hartford, for an accidental injury which occurred on February 2, 1994, and based upon an average weekly wage of \$429.80.

Claimant is entitled to 50.2 weeks of temporary total disability compensation at the rate of \$286.55 per week or \$14,384.81 followed by 296.24 weeks at the rate of \$286.55 per week or \$84,887.57 for a 78% permanent partial general bodily disability making a total award of \$99,272.38.

As of February 7, 1997, there is due and owing claimant 50.2 weeks of temporary total disability compensation at the rate of \$286.55 per week or \$14,384.81, followed by 107.09 weeks of permanent partial disability compensation at the rate of \$286.55 per week in the sum of \$30,686.64, for a total due and owing of \$45,071.45, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$54,200.93 is to be paid at the rate of \$286.55 per week, until fully paid or further order of the Director.

Unauthorized medical expenses pursuant to K.S.A. 44-510(c) in the amount of \$500 is awarded to the claimant upon proper presentation of the medical expense statement.

Future medical expenses are awarded upon proper application to and approval of the Director.

All remaining orders in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of February 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kent Roth, Great Bend, KS
James M. McVay, Great Bend, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director